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## Employment Law

Ronald Turner

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# EMPLOYMENT LAW

Ronald Turner\*

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## I. INTRODUCTION

**T**HIS article surveys significant court decisions and developments in employment law during the Survey period of November 1, 2007 to October 31, 2008.

The discussion unfolds as follows. Part II examines in some detail a recent Supreme Court of Texas decision discussing and ruling on an employee's claim that his employer unconstitutionally employed race-based peremptory challenges in striking African-American jurors from the jury venire in a race discrimination case. Part III turns to employment arbitration and mandamus cases dealing with arbitration agreements and the question whether certain provisions of such agreements were unconscionable and therefore unenforceable. Judicial interpretations and constructions of the Texas Whistleblower Act are discussed in Part IV, including a case presenting a matter of first impression concerning the definition and meaning of that statute's anti-retaliation provision. Part V focuses on selected employment-related torts decisions, and Part VI examines an interesting case interpreting and applying, for the first time, the "safe harbor" provision of the Texas Dram Shop Act.

## II. JURY SELECTION AND RACE-BASED STRIKES

In *Davis v. Fisk Electric Company*,<sup>1</sup> the Supreme Court of Texas considered an African-American employee's claim that, at the trial of his race discrimination suit, his former employer unconstitutionally used per-

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1. 268 S.W.3d 508 (Tex. 2008).

emptory challenges to strike five of six African Americans from the venire.<sup>2</sup>

Donald Davis's action alleged that the company's termination of his employment as an assistant project manager violated 42 U.S.C. § 1981 and the Texas Labor Code. More specifically, Davis contended that his supervisor used the word "nigger" when considering Davis's discharge.<sup>3</sup> At the conclusion of voir dire the employer peremptorily struck six members of the venire—five of the six were African Americans. Citing and relying on *Batson v. Kentucky*,<sup>4</sup> Davis objected to the strikes; that objection was overruled by the trial court. A jury subsequently returned a verdict in favor of the employer, and the employer's victory was affirmed by the court of appeals.<sup>5</sup>

The supreme court, in an opinion authored by Chief Justice Wallace B. Jefferson, concluded that two of the challenged strikes were based on race and remanded the case for a new trial. Reviewing the trial court's *Batson* ruling for abuse of discretion,<sup>6</sup> Chief Justice Jefferson noted that the statistics in the case before the supreme court were "remarkable."<sup>7</sup> From the first twenty-eight venire members, four were struck "for cause or by agreement" of the parties. The employer then used his peremptory challenges to strike "five of the six African Americans (83%) but only one (5.5%) of the eligible nonblack prospective jurors."<sup>8</sup> Chief Justice Jefferson remarked that "'happenstance is unlikely to produce this disparity.'"<sup>9</sup>

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2. *Id.* at 510; see also TEX. R. CIV. P. 232, 233 (providing that each party in a civil action may exercise six peremptory strikes and may challenge jurors "without assigning any reason therefor").

3. See 268 S.W.3d at 510.

4. 476 U.S. 79 (1986). *Batson* held that prosecutorial challenges to potential jurors solely because of the jurors' race or because it was assumed that black jurors would not be able to impartially consider the state's prosecution of a black defendant were proscribed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV; *Batson*, 476 U.S. at 97–98; see also *Goode v. Shoukfeh*, 943 S.W.2d 441, 447–48 (Tex. 1997) (explanations for the peremptory strikes of three African-American jurors and one Latino juror were race-neutral and credible).

The *Batson* regime was later extended to civil cases, see *Edmonson v. Leesville Concrete, Inc.*, 500 U.S. 614 (1991), and has been recognized and followed by the Texas Supreme Court. See *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991) ("[E]qual protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror.").

5. See *Davis v. Fisk Elec. Co.*, 187 S.W.3d 570, 577, 590 (Tex. App.—Houston [14th Dist.] 2006), *rev'd*, 268 S.W.3d 508 (Tex. 2008).

6. See 268 S.W.3d at 515; see also *Goode*, 943 S.W.2d at 446 ("A trial court abuses its discretion if its decision 'is arbitrary, unreasonable, and without reference to guiding principles.'") (quoting *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)).

7. 268 S.W.3d at 516. In noting and discussing the "remarkable" jury strike statistics in Davis's case, the Chief Justice cited the United States Supreme Court's decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005), wherein a prosecutor employed peremptory challenges to exclude ninety-one percent of African-American venire members. See *id.* at 241.

8. 268 S.W.3d at 516. Chief Justice Jefferson also noted that the employer's sixth peremptory strike removed a person of Asian descent. See *id.* at 516 n.5.

9. *Id.* at 516 (internal quotation marks, footnote, and citation omitted).

Moving beyond these “remarkable” statistics, Chief Justice Jefferson addressed the employer’s explanation to the trial court for its peremptory strike of Juror No. 12.<sup>10</sup> According to the employer’s counsel, during voir dire questioning Juror No. 12 “reacted that corporations should be punished with the use of punitive damages” and “seemed to be too ready to believe that Continental [Airlines, Juror No. 12’s employer] has discriminatory employment practices. . . .”<sup>11</sup> But Juror No. 12 “never verbally responded to the questions about punitive damages, Chief Justice Jefferson concluded.”<sup>12</sup> The employer also argued that Juror No. 12 displayed “nonverbal cues” manifesting the juror’s views on punishing corporations with punitive damages.<sup>13</sup> Noting that the United States Supreme Court recently upheld a *Batson* challenge to nonverbal conduct where the trial judge did not make a finding concerning the prosecution’s explanation that an African-American potential juror was struck because of that individual’s nervous demeanor,<sup>14</sup> Chief Justice Jefferson opined that deference to the trial court in Davis’s case was not warranted given the absence of any finding with regard to Juror No. 12’s nonverbal reaction.<sup>15</sup> Without such a finding “we cannot presume the trial court credited [the employer’s] explanation.”<sup>16</sup>

Moreover, the Chief Justice continued, the fact that the employer did not question Juror No. 12 about the claimed nonverbal reaction and failed “to strike a white juror who expressed verbally what [Juror No. 12] purportedly did nonverbally, give[s] us pause.”<sup>17</sup> The Chief Justice expressed concern that “permitting strikes based on an assertion that nefarious conduct ‘happened,’ without identifying its nature and without any additional record support, would strip *Batson* of meaning.”<sup>18</sup> “Nonverbal conduct or demeanor, often elusive and always subject to interpretation, may well mask a race-based strike.”<sup>19</sup> Making clear that peremptory challenges based on nonverbal conduct may be legitimate, Chief Justice Jefferson instructed that the opportunity to rebut such a challenge must be afforded to opposing counsel, the trial court must decide whether the nonverbal conduct accusation “accurately describes what happened during voir dire,” and that there must be a record upon which appellate courts can analyze the issue.<sup>20</sup> Given the employer’s failure to question Juror No. 12 about “his purported reaction,” and in light of the fact that the employer did not strike a white juror who stated that he had no prob-

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10. *Id.*

11. *Id.*

12. *Id.* at 517.

13. *Id.*

14. See *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

15. 268 S.W.3d at 518.

16. *Id.*

17. *Id.*; see also *id.* at 519 (noting that the employer did not strike “a white juror who stated that he would not have a problem awarding punitive damages”).

18. *Id.* at 518.

19. *Id.*

20. *Id.*

lem with punitive damages, Chief Justice Jefferson reasoned that “[t]hese factors suggest that the stated reason—[Juror No. 12’s] ‘reaction’ to punitive damages—was pretextual.”<sup>21</sup>

As for the employer’s contention that Juror No. 12, a seventeen-year employee of Continental Airlines, too readily believed that Continental discriminated against employees, Chief Justice Jefferson quoted and examined the colloquy between Juror No. 12 and the employer’s counsel and found no support for the explanation that Juror No. 12 had any such belief.<sup>22</sup> Indeed, the Chief Justice wrote:

[Juror No. 12], a longtime employee, stated that leaving his old job for Continental was “a better move for him,” and the only thing he said about race discrimination cases was that he had never been involved with one. At best, the record shows that [Juror No. 12] was neutral about employment discrimination issues, providing no support for [the employer’s] asserted reason for striking him.<sup>23</sup>

Chief Justice Jefferson then turned to the employer’s strike of Juror No. 5 and the company’s explanation that Juror No. 5 was a musician who had “the strongest reaction to this whole ‘N’ word issue” and laughed when another juror stated that he had African-American friends.<sup>24</sup> The juror was a musician employed by a church, and the Court came to the conclusion that the strike seemed to be “‘based on a group bias where the group trait is not shown to apply to the challenged juror specifically.’”<sup>25</sup> Therefore, the Court found that the employer’s strike of Juror No. 5 due to his occupation suggested nothing more than a “pretext” for race discrimination.

As for Juror No. 5’s reaction when asked about the “n-word” during voir dire (recall that Davis alleged that his supervisor had used that word), Chief Justice Jefferson’s examination of the record convinced him that Juror No. 5 and two other African Americans struck because of their response to questioning about this “universally offensive epithet”<sup>26</sup> “were no more offended” than three nonblack members of the venire who were seated on the jury.<sup>27</sup> Accordingly, Juror No. 5’s “‘strong reaction’ in the form of his verbal responses to [the employer’s] questions was

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21. *Id.* at 519.

22. The Court did not consider the employer’s argument that Juror No. 12’s voir dire responses about his own experience with discrimination justified a peremptory strike, as that reason had not been presented to the trial court. *See id.* at 519, 521.

23. *Id.* at 520. Juror No. 12’s job responsibilities included the duties of what he called “aide-of-counsel,” which, according to Juror No. 12, was “just like having a union without the union. We’re the representative between management and the person.” *Id.* The employer’s concern about Juror No. 12’s representational activities “(a concern that was never expressed at trial)” did “not explain why [the employer] failed to strike (or even question) juror 27, a white woman, about her membership in a union.” *Id.* at 521.

24. *Id.* The Court did not rely, as did the court of appeals, on Juror No. 5’s voir dire statements that he had been the victim of racial discrimination, noting that the employer did not cite those statements as a basis for striking him. *See id.* at 524.

25. *Id.* at 522 (quoting *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989)).

26. *Id.* at 522 n.12.

27. *Id.* at 522.

no stronger than some of his nonblack counterparts, and [the employer's] strike on this basis suggests pretext."<sup>28</sup>

Concerning Juror No. 5's laughter when another juror stated that he had black friends, Chief Justice Jefferson noted that the employer never asked Juror No. 5 about the laughter, again indicating that the "reason may be pretextual."<sup>29</sup> Further, the Chief Justice pointed out that laughter was relied on as the basis for striking only one other potential juror, who was also an African American.<sup>30</sup> "While [Juror No. 5's] laughter appears at first blush to be a plausible, race-neutral reason for striking him, when we examine the totality of the circumstances . . . we cannot agree that [Juror No. 5's] race was irrelevant."<sup>31</sup>

Finding a statistical disparity and "unequal treatment of comparable jurors"<sup>32</sup> warranting reversal of the jury's verdict for the employer, Chief Justice Jefferson acknowledged that "peremptory strikes, often based on instinct rather than reason, can be difficult to justify,"<sup>33</sup> and emphasized that the employer's counsel's "failure to do so here does not suggest personal racial animosity on his part."<sup>34</sup> Although "race may even serve as a rough proxy for partiality[,] . . . whatever the strategic advantages of that practice, the Constitution forbids it."<sup>35</sup>

*Davis* is an important and interesting exemplar of the Texas Supreme Court's willingness to closely scrutinize claims of race-based peremptory challenges and the unconstitutional targeting of potential jurors of color. Not deferring to the lower courts' overruling of the plaintiff's *Batson* challenges, Chief Justice Jefferson and the supreme court noted the statistical disparity evident in the treatment of African-American and white jurors and examined and critiqued the employer's purportedly race-neutral reasons for its peremptory challenges, finding pretextual masks for race-based strikes in a race discrimination case which would require jurors to hear and evaluate, among other things, the significance of a supervisor's alleged use of the "n-word."<sup>36</sup> Whether and how the supreme court will apply *Davis* in future employment discrimination (and other) cases, and whether the supreme court will extend the analysis to sex and

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28. *Id.* at 524.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 525.

33. *Id.* (citing *Miller-El*, 545 U.S. at 252).

34. *Id.*

35. Justice Scott A. Brister, concurring only in the judgment, disagreed with the supreme court's conclusion that the employer's peremptory strikes were racially motivated. In his view, peremptory strikes do "provide an opportunity for discrimination. But they also provide an opportunity to accuse an opponent of discrimination and get a new trial if the first one turns out badly." *Id.* at 526 (Brister, J., concurring). In a part of his opinion joined by Justice David Medina, Justice Brister argued that the "only way to reduce or eliminate discrimination and suspicion is to reduce or eliminate these strikes." *Id.* at 529; see also *id.* at 531 ("[W]e in Texas must consider whether peremptory strikes are worth the price they impose.").

36. See generally *id.* at 508.

other discrimination claims,<sup>37</sup> are important issues for plaintiffs, employers, and potential jurors of all races, and for judges engaged in the supervision of parties' use of peremptory challenges under and within the *Batson* regime.

### III. EMPLOYMENT ARBITRATION

*In re Poly-America, L.P.*<sup>38</sup> addressed two questions: (1) whether certain employment arbitration agreement provisions contained in an employment contract were unconscionable; and (2) if so, whether the employment contract's severability clause preserved the right to arbitration.

Johnny Luna commenced his employment with Poly-America, L.P. in October 1998. At that time he signed an agreement to submit "all claims or disputes" to arbitration, and signed an amended arbitration agreement in 2002;<sup>39</sup> both agreements were governed by the Federal Arbitration Act (FAA).<sup>40</sup> The arbitration agreement provided, among other things, that employees would split the costs of arbitration with the employer (subject to a cap),<sup>41</sup> that discovery was limited,<sup>42</sup> and that punitive damages and reinstatement remedies under Texas workers' compensation law could not be awarded in arbitration.<sup>43</sup>

Suffering a work-related neck injury in late 2002, Luna filed a workers' compensation claim and, after receiving physical therapy, was released for and returned to light-duty work two weeks later.<sup>44</sup> Continuing to experience pain, he took vacation time.<sup>45</sup> Told by the company doctor that he would lose his job if he did not return to work and stop receiving workers' compensation, Luna returned to work and saw that another individual was being trained for his job.<sup>46</sup> According to Luna, he was harassed by his supervisor.<sup>47</sup> A month after his return to work he in-

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37. See *J.E.B. v. Ala.*, 511 U.S. 127, 129 (1994) (holding that intentional sex discrimination by state actors in the use of peremptory strikes violates the Equal Protection Clause).

38. 262 S.W.3d 337 (Tex. 2008).

39. *Id.* at 344.

40. *Id.*; see also 9 U.S.C. §§ 1-14 (2006).

41. Arbitration-associated fees, including mediation and arbitrator's fees and court reporter and hearing place fees, were to be split between the parties, with a cap for the employee's share set at the employee's gross compensation earned in the employee's highest earning month in the twelve months prior to the time of the arbitrator's issuance of his or her award. See 262 S.W.3d at 344.

42. Each party was limited to twenty-five interrogatories (including sub-parts), twenty-five document production or inspection requests, and one oral deposition not exceeding six hours. Written depositions and requests for admissions were not allowed, and discovery of the employee's or the employer's financial information was not permitted except for employee earnings where the employee sought to recover lost pay, back pay, or front pay. See *id.*

43. Pursuant to the agreement, an arbitrator could not award punitive, exemplary, or liquidated damages and was not authorized to order an employee's reinstatement. See *id.*

44. See *id.* at 344-45.

45. See *id.*

46. See *id.*

47. See *id.*

formed that supervisor that his neck was still bothering him and that he would be returning to the company doctor; Luna was fired on his next regularly scheduled work day.<sup>48</sup>

Luna filed suit alleging that his firing constituted an unlawful retaliatory discharge under the Texas Workers' Compensation Act<sup>49</sup> and sought reinstatement and punitive damages.<sup>50</sup> Texas's workers' compensation law provides, among other things, that persons who violate the statute are liable for the reasonable damages incurred by the employee resulting from the violation, and that an unlawfully discharged employee is entitled to reinstatement in her former position of employment.<sup>51</sup> In addition, Luna sought a declaratory judgment that the aforementioned arbitration agreement violated public policy and was therefore unenforceable. The employer responded to Luna's suit by filing a motion to compel arbitration. When that motion was granted by a trial court, Luna sought and obtained a writ of mandamus from the court of appeals, with that court holding that the arbitration agreement's fee-splitting and limited-remedies provisions were substantively unconscionable.<sup>52</sup>

Reviewing the appellate court's ruling, the Texas Supreme Court held that the arbitration agreement's provision eliminating statutory remedies under the Workers' Compensation Act was unenforceable, and that the provision was severable from the agreement.<sup>53</sup> Writing for the supreme court, Justice Harriet O'Neill noted that arbitration agreements are "historically favored" and "are generally enforceable under Texas law," and that "there is nothing *per se* unconscionable about an agreement to arbitrate employment disputes . . . ."<sup>54</sup> But unconscionable contracts, including arbitration agreements, are unenforceable under state law where, "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract."<sup>55</sup>

Focusing on arbitration agreements covering statutory claims, Justice O'Neill stated that such an agreement "is valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the employee may effectively vindicate his statutory rights."<sup>56</sup> The Justice referenced federal court decisions declaring that an arbitration agreement covering

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48. *See id.*

49. *See* TEX. LAB. CODE ANN. § 451.001 – .003 (Vernon 2006 & Supp. 2008).

50. 262 S.W.3d at 345.

51. *See* § 451.002(a) – (b) (Vernon 2006 & Supp. 2008).

52. *See In re Johnny Luna*, 175 S.W.3d 315, 322, 324 (Tex. App.—Houston [1st Dist.] 2004), *mand. conditionally granted*, 262 S.W.3d 337 (Tex. 2008).

53. 262 S.W.3d at 345.

54. *Id.* at 348.

55. *Id.* (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. a (1981) (setting out factors relevant to the unconscionability determination).

56. 262 S.W.3d at 349.



federal statutory rights is not enforceable when a party must "forgo the substantive rights afforded by the statute" and not just resolve a statutory claim "in an arbitral, rather than a judicial, forum."<sup>57</sup> As she noted, a claim is not arbitrable where Congress has expressed its intent to exempt that claim from arbitration or where the waiver of statutory rights is excessive.<sup>58</sup> "State courts, bound by the FAA under the supremacy clause, have more limited power, as the FAA preempts state laws that specifically disfavor arbitration."<sup>59</sup>

The at-issue arbitration agreement contained provisions prohibiting an arbitrator's order of reinstatement and award of punitive damages. Agreeing with Luna that these provisions were unenforceable, Justice O'Neill "view[ed] the anti-retaliation provisions of the Workers' Compensation Act as a non-waivable legislative system for deterrence necessary to the nondiscriminatory and effective operation of the Texas Workers' Compensation system as a whole . . . ."<sup>60</sup> Noting further that Luna asserted that the employer acted with actual malice in terminating his employment, and that the Workers' Compensation Act provides for punitive damages for such misconduct, O'Neill wrote that "[p]ermitting an employer to contractually absolve itself of this statutory remedy would undermine the deterrent purpose of the Workers' Compensation Act's anti-retaliation provisions."<sup>61</sup> Enforcing the remedies-limiting portions of the arbitration agreement would undo the "carefully balanced competing interests" of employees, employers, and insurance carriers considered in the design of the workers' compensation system.<sup>62</sup> The supreme court declined to allow the employer to opt out of that system and "avoid the Act's penalties by conditioning employment upon waiver of the very provisions designed to protect employees who have been the subject of wrongful retaliation."<sup>63</sup> In Justice O'Neill's words: "Such waivers would allow subscribing employers to enjoy the Act's limited-liability benefits while exposing workers to exactly the sort of costs—of injuries paid for by the employee for fear of retribution for making a claim—that the Act is specifically designed to shift onto the employer."<sup>64</sup>

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57. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

58. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), and *Mitsubishi*, 473 U.S. at 628).

59. *Id.* (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), and *Jack B. Anglin Co. v. Tippus*, 842 S.W.2d 266, 271 (Tex. 1992)).

60. *Id.* at 352.

61. *Id.*

62. *Id.* As the supreme court notes, in enacting the Workers' Compensation Act, the Texas legislature provided "a mechanism by which workers could recover from subscribing employers without regard to the workers' own negligence . . . while limiting the employers' exposure to uncertain, possibly high damage awards permitted under the common law . . . ." *Id.* at 350. Given the purposes of the statute, it is "the settled policy of this State to construe liberally the provisions of the . . . law, in order to effectuate the purpose for which it is enacted." *Id.* (quoting *Huffman v. S. Underwriters*, 128 S.W.2d 4, 6 (Tex. 1939)).

63. *Id.* at 352.

64. *Id.* at 353.

In the remaining pages of her opinion for the supreme court, Justice O'Neill held that the arbitration agreement's fee-splitting provision was not substantively unconscionable. Noting that fee-splitting provisions in employment contracts have been condemned by some courts<sup>65</sup> and have been found to be unenforceable *per se* by others,<sup>66</sup> Justice O'Neill agreed that such "provisions that operate to prohibit an employee from fully and effectively vindicating statutory rights are not enforceable."<sup>67</sup> Rejecting the *per se* unenforceable position, the Justice adopted an approach requiring "some evidence that a complaining party will likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum."<sup>68</sup> Luna estimated that his share of arbitration fees could reach \$3,300 and argued that that amount would prevent him from pursuing his case; the employer argued that, because the costs of litigating the case would be much higher, the arbitration agreement's cap on the employee's share of arbitration fees would benefit Luna and would not be unconscionable. Justice O'Neill concluded that Luna had not demonstrated that he would be unable to pursue his claim because of the estimated costs of arbitration, opining that any cost-related preclusion of Luna's enforcement of his non-waivable statutory rights could be addressed by an arbitrator who "is better situated to assess whether the cost provision in this case will hinder effective vindication of Luna's statutory rights and, if so, to modify the contract's terms accordingly."<sup>69</sup>

Turning to the arbitration agreement's limits on discovery, an issue of first impression for the supreme court, Justice O'Neill determined that, in cases involving non-waivable substantive rights, "*ex ante* limitations on discovery that unreasonably impede effective prosecution of such rights are likewise unenforceable."<sup>70</sup> But who should decide whether the unreasonable impediment standard has been met? Justice O'Neill expressed her doubt that courts evaluating claims and limits on discovery prior to the commencement of arbitration were best situated to answer the question posed in the preceding sentence. Discovery needs in a specific case presenting particular claims and defenses can be assessed by the arbitrator, Justice O'Neill concluded, and any discovery limitations preventing vindication of the employee's non-waivable rights and depriving the employee of a fair opportunity to present a claim would be unconscionable and would not bind the arbitrator.<sup>71</sup>

Having invalidated as substantively unconscionable and void the remedies-limiting provisions of the arbitration agreement while rejecting Luna's challenge to the fee-splitting and discovery-limiting parts of the

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65. *Id.* at 355 (citing *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 – 91 (2000)).

66. *Id.* at 355 – 56 (citing *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483 – 85 (D.C. Cir. 1995)).

67. *Id.* at 356.

68. *Id.*

69. *Id.* at 357.

70. *Id.* at 358.

71. *See id.*

agreement, Justice O'Neill determined that the agreement's severability clause<sup>72</sup> expressed the parties' intent "that unconscionable provisions be excised where possible."<sup>73</sup> As the "main purpose of the agreement" is the submission of disputes to arbitration and not courts, "[e]xcising the unconscionable provisions we have identified will not defeat or undermine this purpose, which we have upheld in the context of agreements to arbitrate employment disputes."<sup>74</sup> Accordingly, arbitration of Luna's claim was compelled pursuant to the conditionally granted writ of mandamus.<sup>75</sup>

Another motion to compel arbitration and petition for a writ of mandamus was at issue in *Wee Tots Pediatrics, P.A. v. Morohunfola*.<sup>76</sup> In that case Dr. Adunni Morohunfola worked for the employer until her employment agreement (which contained an arbitration provision)<sup>77</sup> expired on August 31, 2006. Pursuant to the agreement's covenant not to compete provision Dr. Morohunfola agreed that, during her employment with Wee Tots and for a period of twelve months after the cessation of that employment, she would not engage in or become associated with a pediatric group practice or other designated entities and would not work within a twenty-five mile radius of the employer's business.<sup>78</sup> According to Wee Tots, after her contract expired Dr. Morohunfola joined another pediatric practice in violation of the non-compete covenant. Wee Tots sued the doctor; the doctor then sued Wee Tots alleging various breaches of the employment agreement's compensation provision.<sup>79</sup> Resolving its claims against Dr. Morohunfola in mediation, Wee Tots filed a motion to compel arbitration of the physician's claims; that motion was denied by the trial court.

On appeal, the Fort Worth Court of Appeals, in an opinion by Justice Dixon W. Holman, held that the arbitration agreement in the employment contract covered the doctor's claims. Those claims "fall within the broad scope of the arbitration agreement requiring arbitration of 'all controversies which may arise between the parties,' including disputes arising 'in any manner' relating to the Agreement."<sup>80</sup> Dr. Morohunfola was bound by the express terms of the agreement, as a "person who signs a contract must be held to have known what words were used in the con-

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72. See *id.* at 359 ("Should any term of this Agreement be declared illegal, unenforceable, or unconscionable, the remaining terms of the Agreement shall remain in full force and effect.").

73. *Id.* at 360.

74. *Id.*

75. *Id.* at 361.

76. 268 S.W.3d 784, 787 (Tex. App.—Fort Worth 2008, no pet.).

77. The arbitration agreement provided that "[a]ll controversies which may arise between the parties, including but not limited to any dispute arising over the terms and conditions of this Agreement or in any manner relating to this Agreement . . . shall be submitted upon the written demand of either party to arbitration . . . ." *Id.* at 788.

78. *Id.*

79. See *id.* at 788 – 89. Dr. Morohunfola alleged breach of contract, breach of fiduciary relationship, fraud, and fraud in the inducement. See *id.* at 789.

80. *Id.* at 791.

tract and to have known their meaning, and he must be held to have known and fully comprehended the legal effect of the contract.”<sup>81</sup>

Dr. Morohunfola also argued that Wee Tots waived its right to arbitration by substantially invoking the judicial process before seeking arbitration. The following two-pronged test was applied by the court in determining whether waiver of the right to compel arbitration had occurred: (1) “did the party seeking arbitration substantially invoke the judicial process”; and (2) “did the opposing party prove that it suffered prejudice as a result.”<sup>82</sup> Applying this test and taking a case-by-case and totality-of-the-circumstances approach, Justice Holman found no waiver.<sup>83</sup> Although Wee Tots had served nineteen interrogatories, sixteen admissions requests, and thirty-nine requests for production prior to seeking arbitration, the court concluded (and Dr. Morohunfola acknowledged) that the discovery would be of use in the arbitration.<sup>84</sup> Resolving doubts regarding waiver in favor of arbitration, the court held that the trial court clearly abused its discretion in not compelling the arbitration of Dr. Morohunfola’s claims. Accordingly, conditional mandamus relief was granted and a writ would be issued if the trial court failed to vacate its prior order and did not grant Wee Tots’ motion to compel.<sup>85</sup>

*Poly-America* and *Wee Tots Pediatric* make clear that employment arbitration is and will continue to be an established feature of employment law and policy. While employers can go too far in asking and requiring employees to agree to waive statutory rights and remedies, as did the employer in *Poly-America*, arbitration agreements continue to be enforced where statutory rights can be effectively vindicated in an arbitral forum and where the court concludes that it is doing nothing more than holding employees (and, according to a recent decision, a deceased employee’s beneficiaries)<sup>86</sup> to the agreement to arbitrate employment-related claims and disputes.

#### IV. WHISTLEBLOWERS

The Texas Whistleblower Act<sup>87</sup> protects employees from the adverse personnel actions of state and local government employers taken against employees who make good-faith reports of violations of law to law en-

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81. *Id.* (quoting *Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564, 570 (Tex. App.—San Antonio 2004, no pet.)).

82. *Id.* at 792.

83. *Id.* Factors considered in the totality-of-circumstances analysis include when the party moving for arbitration knew of the arbitration clause, “how much discovery ha[d] been conducted, who initiated the discovery, whether [the discovery] related to the merits rather than arbitrability or standing,” the utility of the discovery in arbitration, and whether the party seeking to compel arbitration sought judgment on the merits. *Id.*

84. *Id.*

85. *Id.* at 793.

86. See *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009) (arbitration provision between employer and deceased employee signed before the employee’s death required the deceased’s beneficiaries, who did not sign the agreement, to arbitrate their wrongful death claims against the employer).

87. See TEX. GOV’T CODE ANN. §§ 554.001–554.010. (Vernon 2004 & Supp. 2008).

forcement authorities.<sup>88</sup>

In *Montgomery County v. Park*,<sup>89</sup> David Park, a patrol lieutenant with the sheriff's department of Montgomery County (who also served as the security coordinator for the county's convention center events), informed his administrative assistant that a county commissioner had allegedly made graphically sexual comments about her and another employee.<sup>90</sup> Subsequently informed by his assistant and another administrative assistant of a number of instances of sexual harassment by the same commissioner, Park reported the commissioner's conduct to the sheriff, and the county commenced an investigation. While the investigation was in progress, the commissioner allegedly ordered that Park be relieved of his security coordinator responsibilities; those duties were initially transferred to the constable's office before being rotated between the constable's and sheriff's offices. Alleging that the reassignment of the security coordinator duties was retaliation for his reporting of the commissioner's asserted misconduct, Park filed a lawsuit alleging that the county violated the Whistleblower Act.<sup>91</sup>

Chief Justice Jefferson, writing for the Texas Supreme Court on a matter of first impression, noted that the Whistleblower Act defined "personnel action" but did not define "adverse."<sup>92</sup> In his view definition of the latter term required "a careful balancing."<sup>93</sup> The protection of employees who in good faith report violations of law encourages reporting and the reduction of illegal conduct by governments and employees. "Requiring too high a level of adversity would defeat this important purpose."<sup>94</sup> But "setting the standard too low could . . . saddle the public with the cost of defending against unmeritorious claims—in terms of litigation expenses and in chilling innocuous personnel actions that an employee may perceive as subjectively adverse."<sup>95</sup>

Chief Justice Jefferson found guidance for the resolution of the Whistleblower Act issue in the United States Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>96</sup> wherein the Court concluded that a plaintiff alleging a violation of the anti-retaliation

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88. State and local governments "may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." § 554.002(a). A report to an "appropriate law enforcement authority" is made if "the authority is part of a state or local government entity or of the federal government that the employee in good faith believes is authorized to . . . regulate under or enforce the law alleged to be violated in the report" or "investigate or prosecute a violation of criminal law." § 554.001(b).

89. 246 S.W.3d 610 (Tex. 2007).

90. See *id.* at 612–13.

91. See *id.*

92. A "personnel action" is "an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation . . ." *Id.* at 613.

93. *Id.* at 614.

94. *Id.*

95. *Id.*

96. 548 U.S. 53 (2006).

provision of Title VII of the Civil Rights Act of 1964<sup>97</sup> must demonstrate that “a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.”<sup>98</sup> Adopting and modifying the *Burlington* standard, Chief Justice Jefferson stated:

We hold that a personnel action is adverse within the meaning of the Whistleblower Act if it would be likely to dissuade a reasonable, similarly situated worker from making a report under the Act. This objective test strikes an appropriate balance between the need to shield whistleblowers . . . and the need to protect government employers from baseless suits, and, in addition, provides lower courts with a judicially manageable standard.<sup>99</sup>

Did Park suffer an adverse personnel action? Answering that question in the negative, Chief Justice Jefferson noted that Park did not argue that the reassignment of his security coordinator responsibilities “affected his prestige, opportunity for advancement in the department, or the difficulty of his work conditions . . . .”<sup>100</sup> Park’s pay was not reduced and he was not barred from seeking and obtaining outside employment. While Park did have the ability as security coordinator to assign himself extra work at events at the convention center, there was “no evidence that losing the first choice of extra jobs . . . actually reduced Park’s earnings.”<sup>101</sup> Comparing Park’s loss of the coordinator duties to the reassignment of work challenged by the employee in the Supreme Court’s *Burlington* decision,<sup>102</sup> Chief Justice Jefferson concluded that, as a matter of law, Montgomery County did not violate the Whistleblower Act.<sup>103</sup>

It can be argued that the supreme court did not recognize the legal and practical significance of the non-monetary aspects of the alleged retaliation challenged by Park. An employee reports, in good faith, that a high-level official has engaged in serious misconduct and loses a position. If, as the supreme court declares, the focus of the analysis must be on the likelihood that a reasonable, similarly situated employee would be dissuaded from making a report, it is by no means clear that removing an employee from a position the employee would have continued to hold if he had not reported sexual harassment or other misconduct does not or may not send a message that the whistleblower law will not shield reporters. And one must wonder what message is sent to the other employees who shared their concerns with Park when they learned that the reassign-

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97. See 42 U.S.C. §§ 2000e–2000e-17. (2000); 42 U.S.C. § 2000e-3(a) (2000).

98. 548 U.S. at 68 (internal quotation marks omitted).

99. 246 S.W.3d at 614.

100. *Id.* at 615.

101. *Id.*

102. The *Burlington* employee-plaintiff was reassigned from her forklift operator job to a less desirable track laborer position and was suspended without pay for thirty-seven days (including through the Christmas holiday season) before receiving back pay as the result of a successful grievance. See 548 U.S. at 58-59, 72.

103. 246 S.W.3d at 616.

ment of part of his duties was not deemed to be an unlawful response to his efforts to bring to light alleged sexual harassment. The disincentive to report, which is grounded in the concern about and fear of retaliation, does not only deter the person blowing the whistle. That concern and fear can extend to others who know about but are hesitant to share and communicate their knowledge of unlawful conduct to the whistleblower, like the administrative assistants who provided information to Parker about the commissioner's alleged acts of sexual harassment.<sup>104</sup>

The Whistleblower Act and the meaning and scope of the anti-retaliation provision of the Texas Commission on Human Rights Act (CHRA)<sup>105</sup> were addressed by the Texas Supreme Court in *City of Waco v. Lopez*.<sup>106</sup> In August 2001, Robert Lopez was transferred (according to the city, because of complaints about his attitude) from his position as Waco's chief plumbing inspector to a job in the plumbing code enforcement division.<sup>107</sup> Lopez filed a grievance with the city's equal employment opportunity (EEO) officer and complained that he was transferred because of his age and race. Transferred back to his original job, Lopez was subsequently discharged in October 2001 for taking a city vehicle to Austin, Texas, without prior approval and contrary to the city's policy.

Lopez then sued Waco under the Whistleblower Act, alleging that he was fired in retaliation for the grievance he filed with the EEO officer.<sup>108</sup> Waco argued that the CHRA was Lopez's exclusive remedy for his claim of retaliatory discharge. The CHRA provides that it is unlawful for an employer to retaliate "against a person who, under this chapter: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing."<sup>109</sup>

Justice Dale Wainwright's opinion for the supreme court reasoned that Lopez's internal grievance submitted to the city's EEO officer did implicate the anti-retaliatory provision of the CHRA. Yet, Lopez contended that his claim was brought under the Whistleblower Act, arguing that he never filed a complaint with or otherwise invoked the CHRA. Justice Wainwright rejected that argument.<sup>110</sup> In his view, Lopez's age and race discrimination complaint to Waco's EEO officer and allegation that he was discharged for making that complaint involved proscribed retaliation for opposing conduct made unlawful by the CHRA "irrespective of the merits of the underlying discrimination claim."<sup>111</sup> The CHRA's anti-retaliation provision "covers a wide array of situations in which discrimina-

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104. See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005) ("Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.").

105. See TEX. LAB. CODE ANN. §§ 21.001-21.556 (Vernon 2006 & Supp. 2008).

106. 259 S.W.3d 147 (Tex. 2008).

107. See *id.* at 149 – 50.

108. See *id.*

109. TEX. LAB. CODE ANN. § 21.055.

110. See 259 S.W.3d at 151.

111. *Id.*

tion may have been alleged by the employee or someone else,” and “[a]n internal grievance alleging conduct that is actually prohibited by the CHRA reasonably equates to opposition to discriminatory conduct ‘under’ the CHRA, regardless of whether a formal CHRA complaint has been filed. The touchstone is not availment, but availability of the CHRA remedies.”<sup>112</sup> As for Lopez’s argument that the CHRA did not apply because he never invoked that statute, Justice Wainwright cautioned that requiring an employee to make an express invocation of that statute “as a predicate to pursuing a retaliation claim” could result in the avoidance of liability by the employer who “swiftly fir[es] the employee. Such an absurd result cannot be intended by the Legislature.”<sup>113</sup>

Lopez argued that, because the CHRA did not preclude his Whistleblower Act claim, he could choose to proceed under either statute. For Justice Wainwright, this argument presented the question whether the Texas legislature “intended to allow a claimant to elect between two remedial schemes addressing essentially the same conduct but providing different procedures and remedies.”<sup>114</sup> Examining and comparing (1) the Whistleblower Act’s procedures and general remedy for retaliation for reporting violations of law and (2) the CHRA’s prohibition of “the specific evil of discrimination and retaliation in the workplace” and comprehensive remedial scheme,<sup>115</sup> the Justice concluded that

the statutes provide irreconcilable and inconsistent regimes for remedying employer retaliation . . . . If allowed to bring their claims under the Whistleblower Act, public employees would have little incentive to submit to the administrative process the Legislature considered necessary to help remedy discrimination in the workplace. Such a result would frustrate clear legislative intent.<sup>116</sup>

Consequently, Justice Wainwright determined, “the Whistleblower Act must yield to the CHRA for retaliation claims arising from allegations of employment discrimination made unlawful under the CHRA.”<sup>117</sup> Because Lopez had not invoked CHRA procedures and had not pled a CHRA cause of action, the supreme court dismissed his case.<sup>118</sup>

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112. *Id.*

113. *Id.*

114. *Id.* at 153.

115. *Id.* at 153 – 54. Justice Wainwright noted that the CHRA’s regulatory scheme includes administrative review, alternative dispute resolution, and a requirement of exhaustion of administrative remedies, and that the Texas Workforce Commission’s civil rights division receives and investigates complaints of workplace discrimination and is empowered to resolve and settle cases in which the agency determines that there is reasonable cause to believe that the law has been violated. *See id.* at 154.

116. *Id.* at 154, 155.

117. *Id.* It must be noted that the supreme court limited its holding to claims of retaliatory discharge based on harms addressed and redressed by the CHRA and did not express any opinion as to whether a Whistleblower Act retaliation claim may be available under other antidiscrimination laws covering conduct not prohibited by the CHRA. *See id.* at 156.

118. *See id.*



## V. EMPLOYMENT-RELATED TORTS

*General Electric Co. v. Moritz*<sup>119</sup> asked and answered in the negative the question of whether a landowner must warn an independent contractor's employee of obvious hazards already known to the employee. Arthur Moritz was an employee of an independent contractor that delivered General Electric (GE) parts to customers.<sup>120</sup> While loading product onto his pickup truck on a ramp at the GE warehouse (the ramp had six-inch curbs but did not have guard rails), Moritz attempted to add a bungee cord to secure the load. "[T]he cord broke while he was leaning back to stretch it" and Moritz fell from the side of the ramp, fracturing his hip, pelvis, and thumb.<sup>121</sup> He sued GE and others, alleging that the owners and occupiers of the premises were liable for negligent activities and premises conditions. The trial court granted summary judgment for the defendants; the Fort Worth Court of Appeals, finding fact questions precluding summary judgment, reversed.<sup>122</sup> A divided Texas Supreme Court reversed the court of appeals.<sup>123</sup>

Justice Scott A. Brister, writing for the majority,<sup>124</sup> concluded that no fact question existed with regard to Moritz's negligent activity theory. Justice Brister pointed out that, as a general matter, an owner or occupier has no duty to ensure that independent contractors perform their work safely, and that "one who retains a right to control the contractor's work," by contract or implied by conduct, "may be held liable for negligence in exercising that right."<sup>125</sup> The summary judgment record contained no evidence that Moritz's duties were governed by contract, and there was no evidence that GE controlled how or where Moritz secured his delivery load.<sup>126</sup> The Court explained that:

[any GE] control of where Moritz could load supplies did not dictate where he could secure that load. . . . Moritz admitted at his deposition that he could have driven off the ramp before securing his load. As an independent contractor, Moritz was free to choose whatever vehicle he wanted for deliveries, and when, where, and how he would secure his load.<sup>127</sup>

In the absence of contractual or actual control of Moritz's decisions Justice Brister saw no fact question as to Moritz's negligent activity theory.<sup>128</sup>

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119. 257 S.W.3d 211 (Tex. 2008).

120. *See id.* at 213 – 14.

121. *Id.* at 214.

122. *Id.*

123. *Id.* at 213.

124. Joined by Justices Nathan L. Hecht, Dale Wainwright, David Medina, and Don R. Willett.

125. *Id.* at 214.

126. *See id.*

127. *Id.* at 214 – 15.

128. *See id.*

Justice Brister also rejected Moritz's argument that the defendants had a duty to warn Moritz that the ramp from which he fell did not have guardrails.<sup>129</sup> A landowner is only liable to an independent contractor's employees for claims arising from a concealed, pre-existing defect: the "owner or occupier has a duty to inspect the premises and warn of *concealed* hazards the owner knows or should have known about."<sup>130</sup> Justice Brister observed that the absence of rails on the loading ramp "was obviously a pre-existing condition and obviously not a concealed hazard."<sup>131</sup> GE had no duty to warn Moritz. "If owners and occupiers have no duty to warn an independent contractor of open and obvious defects, the defendants had no duty to warn Moritz that the ramp he had been using for more than a year had no handrails."<sup>132</sup> Rather than place a duty to warn on owners and occupiers in the circumstances before the supreme court, Justice Brister argued that "[p]lacing the duty on an independent contractor to warn its own employees or make safe open and obvious defects ensures that the party with the duty is the one with the ability to carry it out."<sup>133</sup>

In an age of an ever-increasing number of workers considered to be and categorized as independent contractors, the supreme court's focus on a worker's legal status in determining whether an owner and occupier has a duty to warn those who are performing work on their premises about dangerous conditions is an important development. As the dissenting Justices noted in *Moritz*, only the landowner has control over and can change an unsafe condition; the employee of the independent contractor does not have such control and has no authority to make what she believes to be safety-enhancing improvements.<sup>134</sup> But the result in *Moritz* is at least plausible and undoubtedly persuasive to many, given the record evidence and the scenario involving a worker who was familiar with GE's operation and knew of the absence of guard rails which may have provided some measure of protection for those falling while working on the loading ramp, as opposed to a situation involving a worker new to and unaware of his surroundings.

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129. *Id.* at 215.

130. *Id.* (quoting *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295 (Tex. 2004)).

131. *Id.*

132. *Id.* at 216. "If Moritz wanted to use bungee cords and lean over backwards, that was his business; but he could not require GE to keep him safe no matter how he chose to do his own work." *Id.* at 217.

Justice Paul W. Green's dissent, joined by Chief Justice Jefferson and Justice Phil Johnson, argued that Moritz "had no authority to alter the premises conditions, and thus could not require that guard rails be placed along the ramp for his safety. Moritz controlled only the specific location and manner in which he loaded his truck." *Id.* at 219 (Green, J., dissenting). Justice Green would not "cling to false distinctions based on independent contractor status or control over Moritz's activities . . ." *Id.* at 221. He would focus, instead, on "who actually had control over the premises condition. Neither Moritz nor his employer had control over the premises condition that resulted in Moritz's injury." *Id.* Because only GE could address and change that condition, "GE owed a duty to either warn Moritz of the dangerous premises condition or to make it safe." *Id.*

133. *Id.* at 216.

134. *Id.* at 219.

In *Brookshire Grocery Co. v. Goss*,<sup>135</sup> an employee of a grocery store, Barbara Goss, was retrieving items from a deli cooler and stepped over a "lowboy" loading cart stocked two to three feet high with frozen turkey and ham dinners.<sup>136</sup> Retrieving items from the cooler, Goss turned to leave and hit her shin on the lowboy; reaching out for a shelf to avoid falling, she injured her back and was taken to the hospital and remained under medical care.<sup>137</sup> Goss sued her employer and claimed that it negligently failed to warn employees of the risk of maneuvering around the lowboy loading carts.<sup>138</sup> Finding for Goss, a jury awarded damages for physical pain, mental anguish, loss of earning capacity, physical impairment, and medical expenses; that judgment was affirmed by the Texarkana Court of Appeals.

The Texas Supreme Court began its analysis by noting that "we have held that an employer 'owes no duty to warn of hazards that are commonly known or already appreciated by the employee.'" <sup>139</sup> The supreme court found no evidence "that keeping a loaded lowboy in a cooler was unusually dangerous. A stationary, loaded lowboy is easily visible, and Goss saw it upon entering the cooler. To the extent that stepping over a lowboy is dangerous, it is a danger apparent to anyone, including Goss."<sup>140</sup> Moreover, the supreme court continued, Goss had encountered lowboys during the course of her employment and safely navigated around the lowboy when she entered the cooler. Because stepping over a cart is "a risk commonly known and appreciated," the supreme court concluded that the employer had no duty to warn Goss and reversed the court of appeals' judgment.<sup>141</sup>

## VI. THE DRAM SHOP ACT

*20801, Inc. v. Parker*<sup>142</sup> called upon the Texas Supreme Court to interpret, for the first time, the "safe harbor" provision of the Texas Dram Shop Act.<sup>143</sup> In November 1999, John Parker attended the grand opening of a Harris County Slick Willie's pool hall (operated by 20801, Inc.).<sup>144</sup> According to Parker, bar employees served him ten to fifteen alcoholic beverages (including two free drinks provided by the manager). The manager asked Parker to leave the establishment after Parker and

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135. 262 S.W.3d 793 (Tex. 2008) (per curiam).

136. The "lowboy cart measures roughly two-and-a-half feet by five feet and its bed sits about ten inches off the ground. It has four wheels and a handle on one end and measures about forty-two inches from the ground up." *Id.* at 794 n.1.

137. *See id.* at 794.

138. The employer was a nonsubscriber under the Texas Workers' Compensation Act and was, thus, subject to the negligence suit brought by Goss. *Id.* at 794 n.2.

139. *Id.* at 794 (quoting *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006)); *see also* *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568 (Tex. 2007).

140. 262 S.W.3d at 795.

141. *Id.*

142. 249 S.W.3d 392 (Tex. 2008).

143. *See* TEX. ALCO. BEV. CODE ANN. §§ 2.02(b), 106.14(a) (Vernon 2007 & Supp. 2008).

144. 249 S.W.3d at 394.

another customer, Anthony Griffin, were involved in an argument. While in the parking lot, Griffin punched Parker and Parker fell, striking his head on the pavement.

Alleging that he suffered a fractured skull and disabling brain injuries as a result of this altercation, Parker sued Slick Willie's under the Texas Dram Shop Act.<sup>145</sup> Specifically, Parker asserted that Slick Willie's and its agents and/or employees were negligent in providing intoxicating alcoholic beverages and liquor to Parker and Griffin when Slick Willie's "knew or should have known that they had become obviously intoxicated to such a degree as to present a clear and present danger to themselves and others . . . and that such intoxication was a proximate cause of the damages suffered by Parker."<sup>146</sup> Slick Willie's successfully moved for summary judgment. The Houston Court of Appeals reversed in part, holding that the employer had not satisfied the Dram Shop Act's safe harbor provision—i.e., had not established that it "had not directly or indirectly encouraged its employees to violate the law."<sup>147</sup>

The Texas Supreme Court, per Chief Justice Jefferson, disagreed with the court of appeals. The supreme court explained that the Dram Shop Act imposes liability on providers of alcoholic beverages for those damages proximately caused by intoxicated persons "who were served despite being obviously drunk."<sup>148</sup> The safe harbor provision of the statute (Section 106.14(a)), "apparently unique to Texas,"<sup>149</sup> eliminates liability in the following circumstances: (1) where the employer required its employees to attend approved seller training programs; (2) an employee attended the training program; and (3) the employer "has not directly or indirectly encouraged the employee to violate such law."<sup>150</sup> As it was not contested that Slick Willie's had complied with the first two safe harbor elements, the parties and the supreme court focused on the third element.

The supreme court concluded, first, that while the burden of establishing the first two elements of the safe harbor provision lies with the providers, plaintiffs bear the burden of showing the third element—that the employer directly or indirectly encouraged an employee to "over-serve."<sup>151</sup> In so concluding the supreme court opined that requiring providers to prove that they did not "encourage employees to over-serve would be an inefficient and uneconomical use of judicial resources," and that "as a practical matter, proving a negative is always difficult and frequently impossible."<sup>152</sup>

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145. Parker also sued under a premises liability theory. The trial court's grant of summary judgment to the employer on that claim was affirmed by the court of appeals. *See id.* at 395.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 395 – 96.

150. *Id.* at 396 (quoting TEX. ALCO. BEV. CODE ANN. § 106.14(a)).

151. *Id.* at 397.

152. *Id.* (internal quotation marks and citation omitted).

Turning next to Slick Willie's argument that employers are not liable unless they knowingly encourage employees to violate the law or were consciously indifferent to employees' violations, the supreme court disagreed with the argument "that the plain meaning of encourage necessarily implies knowing conduct. Although encouragement is generally intentional, it is possible, under certain circumstances, for providers to negligently encourage their employees to violate the law."<sup>153</sup> The supreme court thus concluded that to "encourage" its employees "a provider must act (or fail to act) at least negligently. . . ."<sup>154</sup> In making the negligence determination, the supreme court instructed that an employer's challenged conduct will be compared to "a reasonable provider of the defendant's type (a bar or liquor store owner, for example), and the circumstances in these cases will include a provider's awareness of, and reliance on, its employees' successful completion of an approved seller training program."<sup>155</sup>

Slick Willie's argued further that the court of appeals erred when it required Slick Willie's "to 'prove enforcement of its alcohol policies on a particular occasion to satisfy the third element of [section 106.14(a)].'"<sup>156</sup> The supreme court agreed. The safe harbor provision does not require that providers create formal policies, and the provider is relieved of liability for the conduct of an employee who, having been trained and with no employer encouragement, violates the law. "A provider otherwise qualifying for this protection, then, would need to invoke it only when its policy was *not* enforced—thus, under the court of appeals' interpretation, section 106.14(a) would be of no practical use."<sup>157</sup> The supreme court decided that it would not require a provider meeting its burden under section 106.14(a) to demonstrate enforcement at the time of the particular event giving rise to a lawsuit.<sup>158</sup>

Applying this analysis to Parker's suit against Slick Willie's, the supreme court noted the absence of record evidence of the employer's direct or indirect encouragement that its employees violate the law. There was no evidence that Parker was obviously drunk when the manager served him two free drinks. As the supreme court opined, "serving two free drinks to a person who is not obviously intoxicated is neither a violation of the Act nor does it encourage others to violate the Act."<sup>159</sup>

Interestingly, the Court recognized that the standard announced in its decision could not have been reasonably anticipated by Parker and remanded the case to the trial court so that Parker could conduct more

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153. *Id.* at 398.

154. *Id.*

155. *Id.*

156. *Id.* (quoting *Parker v. 20801, Inc.*, 194 S.W.3d 556, 565 (Tex. App.—Houston [14th Dist.] 2006, pet. granted), *rev'd by* 249 S.W.3d 392 (Tex. 2008)).

157. *Id.* at 399.

158. *Id.*

159. *Id.* at 399 – 400.

discovery and present additional evidence.<sup>160</sup> The statute's text and the supreme court's interpretation and application thereof would appear to be major obstacles for Parker. The "unique" safe harbor provision provides a defense for and insulates from liability those employers who comply with section 106.14(a) in training their employees and do not encourage their workers to violate the Dram Shop Act. Further, the Court's placement of the burden of proof on plaintiffs, who must now show that the employer-provider directly or indirectly encouraged an employee to over-serve, is significant. As in all areas of law, the party who must demonstrate certain facts in order to prevail faces and must grapple with the reality that its prospects of success will or may be diminished by the allocation of the burden of proof. Whether Parker will be able to make the requisite showing will shed light on the operative meaning and consequences of the Court's decision.

## VII. CONCLUSION

The employment law cases discussed in the preceding parts of this Article addressed important issues in the areas of jury selection and race-based challenges, employment arbitration, the still developing law of the scope and limits of whistleblower protection, employment-related tort actions, and an employer's reliance on the training of its employees as a statutory defense to a plaintiff's allegation that the negligent over-serving of an obviously intoxicated individual was the proximate cause of damages suffered by that person. As can be seen, employment law includes a range of issues, claims, and work-related contexts. This survey's selective and non-exhaustive discussion provides only a sampling of the important employment law developments and judicial decisions issued in the November 2007 – October 2008 Survey period.

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160. *Id.* at 400.

